77-884

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. ....., Misc.

TONY GARRETT,

Petitioner,

v.

W. J. ESTELLE, JR., Director,
Texas Dept. of Corrections, et al.,

Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

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Petitioner Tony Garrett respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on August 3, 1977, reversing an order of the United States District Court for the Northern District of Texas, William M. Taylor, Jr., Judge.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit reported at 556 F.2d 1274 (5th Cir.

1977), is attached hereto as Appendix A. The Opinion of the United States District Court for the Northern District of Texas reported at 424 F.Supp. 468 (D.N. Tex. 1977), is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit on expedited appeal was entered on August 3, 1977. (Appendix C). A timely petition for rehearing en banc was filed, August 17, 1977, and denied September 21, 1977. (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether state prison officials may constitutionally refuse to permit Plaintiff newsman, as part of a permitted pool of reporters, to photograph, state executions for dissemination to the public solely because the state believes the content of such taped video rebroadcasts is offensive to the public?

2. Whether the public posseses a constitutional right to know how public officials conduct executions?

3. Whether the extension of access for print coverage of executions while denying access for visual coverage constitutes a violation of Plaintiff newsman's right to equal protection of the laws and equal liberty of expression under the first and fourteenth amendments?

4. Whether the state may restrict the method of use of a closed circuit telecast provided to reporters?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The applicable constitutional provisions, statutes and rules are:

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Texas Code of Criminal Procedure, Article 43.17

Upon the receipt of such condemned person by the Director of the Department of Corrections, he shall be confined therein until the time for his execution arrives, and while so confined, all persons outside of said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business, and the relatives, friends and spiritual advisors of the condemned person, who shall be admitted to see and converse with him at all proper times.

Texas Code of Criminal Procedure, Article 43.20

The following persons may be present at the execution: the executioner, and such persons as may be necessary to assist him in conducting the execution; the Board of Directors of the Department of Correction, two physicians, including the prison physician, the spiritual advisor of the condemned, the chaplains of the Department of Corrections, the county judge and sheriff of the county in which the Department of Corrections is situated, and any of the relatives or friends of the condemned person that he may request, not exceeding five in number, shall be admitted. No convict shall be permitted by the prison authorities to witness the execution.

Texas Department of Corrections Media Policy

Media Policy: Execution Proceedings. One Texas bureau representative designated by the Associated Press and one Texas bureau representative designated by the United Press International will be admitted to the execution chamber as witness, provided those designated agree to act as pool reporters for the remainder of the media present and to meet with all media representatives present immediately subsequent to the execution. *The remainder of the media shall be allowed to witness the execution via closed circuit television monitors.*

Press interviews of condemned prisoners shall be scheduled by the Public Affairs Office and conducted at the Ellis Unit each Wednesday during the hours of 9:00-11:00 A.M. No press interviews of the condemned shall be allowed at the Huntsville Unit. Only properly credentialed press will be admitted to witness the execution. *No recording devices, either audio or video, shall be permitted either in the execution chamber or monitor room.* All persons entering the monitor area shall submit to electronic surveillance.

Any person detected attempting to introduce recording equipment into the monitor area shall be excluded automatically. No video tapes shall be made from the monitor system.
TDC shall provide the press the following data:

. . . Historical data concerning the death penalty
. . . Public record information concerning the condemned
(Name, D.O.B., Race, County of Conviction, Date Received)
. . . Photograph of condemned

STATEMENT OF THE CASE

On December 13, 1976, Tony Garrett, a reporter-producer for television station KERA, Dallas, Texas filed suit against the Texas Board of Corrections seeking to have Article 43.20 of the Texas Code of Criminal Procedure held unconstitutional as violating his rights under the First and Fourteenth Amendments of the United States Constitution. He further sought to enjoin the Board from denying him access to condemned prisoners and from denying him permission to film for rebroadcast electrocutions carried out in Texas.

The District Court conducted a series of hearings on December 17, 1976, December 21, 1976 and January 3, 1977. At the conclusion of the hearings, the Court granted a preliminary injunction and held Article 43.17 unconstitutional and ordered Defendants to permit Mr. Garrett access to death row prisoners; to permit him to film for rebroadcast to the public any execution provided he agreed to act as a pool representative of the electronic media; and to reinstitute the state media policy for executions which allowed two media repre-

sentatives to witness executions in the execution chamber and others to witness it via a closed circuit television broadcast. Thereafter, Defendants filed a motion to dismiss and an answer stating their intent to reinstate the media policy; to amend Article 43.17 to allow media interviews on death row; to allow closed circuit television broadcasts from the execution chamber to a room reserved for pool reporters from the news media (equipment and installation to be financed by the press). Defendants further requested a stay of the order allowing Garrett to film executions. The District Court denied the stay, entered its order, and filed a memorandum opinion.

As a preliminary matter, the District Court distinguished this case from *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) on four different grounds:

(1) *Pell* and *Saxbe* involved the use of a specific newsgathering technique for coverage of day-to-day prison conditions while this case involved the coverage of a news event of singular public importance or "newsworthiness."

(2) In *Pell* and *Saxbe* substantial access to the news sources had already been granted, but in this case no access to death row was allowed.

(3) *Pell* and *Saxbe* involved harms produced by the newsgathering process to legitimate state interests in maintaining internal discipline, security, and rehabilitative techniques while this case involved no harm to any state interest.

(4) No threat to deterrence was posed by the gathering or dissemination of the information requested in this case.

The District Court found the total ban on news media access to death row unconstitutional, but its holding was not without restrictions:

> That there can be no complete ban on access to "death row" or to executions, of course, does not mean that there can be no regulation of public or media access to "death row" and the inmates therein. On the contrary, prison officials have broad authority to regulate and limit access where there are security, disciplinary, rehabilitation, administrative or other reasons for so doing. All this Court is ordering is that the Texas Department of Corrections restore the limited access it previously allowed and, in addition, to permit one television reporter with camera to witness any execution. *Garrett, supra*, 472.

It clearly attempted to follow its perception of rules laid down in *Pell* and *Saxbe*.

The District Court then proceeded to note the fundamental distinction between *Pell* and *Saxbe*, and this case:

> Of course, the real concern is not over the presence of a television reporter with camera at an execution or even the filming of the execution, but rather the possible later broadcast of such film on television news program. It is argued that such broadcasts would be an 'offense to human dignity,' 'distasteful,' or 'shocking.' This may well be true, but the question here is whether such decisions are to be made by government officials or by television news directors. The state says, in effect, that 'We, the government, have determined that the governmental activity in this instance is not fit to be seen by the people on television news.' In addition to being ironic, such a position is dangerous. If government officials can prevent the public from witnessing films of governmental

> proceedings solely because the government subjectively decides that it is not fit for public viewing, then news cameras might be barred from other public facilities where public officials are involved in illegal, immoral, or other improper acitivities that might be 'offensive,' 'shocking,' 'distasteful' or otherwise disturbing to viewers of television news.
>
> * * *
>
> 2. It might be suggested here that if what the government is doing is so terrible, perhaps the government should not be doing it. At the very least, the people should have the widest possible information about such 'shocking' governmental proceedings. *Id.*, 472-73 (text and ftn. 2)

In short, the District Court found that the sole purpose for refusing Garrett to film an execution for public dissemination was that the state did not believe the content of such expression was fit for public consumption.

The sole issue appealed by Defendants was the order allowing Tony Garrett to film executions for rebroadcast in a public television documentary. Defendants' brief argued that the District Court had failed to apply correctly the rule of *Pell* and thereby effectively subverted and eviscerated the clearly enunciated policy of the State of Texas expressed in Article 43.20, Texas Code of Criminal Procedure, to prevent executions from becoming "public spectacles."

Plaintiff Garrett and Amicus Curiae Reporters Committee For Freedom of Expression, News Paper Guild of the AFL-CIO, and Radio Television News

Directors Association noted in their briefs that Texas had no objection to the filming and closed circuit broadcast of executions to the press. The sole goal of Texas was to prohibit any dissemination of the visual broadcast to the public. Garrett and Amicus argued such a goal amounted to a content-based prior restraint upon the press in violation of the First Amendment, a content-based discrimination against the electronic media, an unconstitutional infringement of the right to gather the news, and an unconstitutionally over-broad restriction of protected expression.

In its decision, the United States Court of Appeals for the Fifth Circuit held that under *Pell* and *Saxbe* the press has no right to gather material unavailable to the general public; that the public has no right of access to film executions under Texas law; therefore the press possesses no right to film executions even from the closed circuit telecast provided generally by Texas to the media. The Fifth Circuit rejected the fundamental argument of plaintiffs in the following language:

> Garrett and amicus argue that the present case is not an access case, but a case involving a limitation on the content of what may be reported once access has been granted. *Saxbe* and *Pell* speak only to access questions, they maintain. This argument cannot be sustained by *Saxbe* and *Pell*. In those cases access was provided except for one purpose, that is, the conducting of prearranged personal interviews. In the present case, similarly, access is provided except for one purpose, to film executions. In order to sustain Garrett's argument we would have to find that the moving picture of the actual execution possessed

> some quality giving it "content" beyond, for example, that possessed by a simulation of the execution. We discern no such quality from the record or from our inferences therein. Despite the unavailability of film of the actual execution the public can be fully informed; the free flow of ideas and information need not be inhibited. *Garrett v. Estelle*, 556 F.2d 1278.

In addition, the Court found that the "notoriety" of an issue in no way affected First Amendment protections; that the decision of Texas to allow closed circuit television broadcasts to reporters and to allow reporters to interview prisoners on death row amounted to sufficient access to such news sources; that there was no need for the state to present any interest compelling or otherwise, to deny Garrett the right to film for rebroadcast the closed circuit telecast of the execution; that no denial of equal protection resulted from allowing print media coverage while excluding visual coverage; that the public has no right to witness an execution; and finally that the state of Texas may grant access generally to the closed circuit telecast and yet limit the manner in which the press may report the news event from the closed circuit telecast.

REASONS FOR GRANTING THE WRIT

A writ of certiorari is sought from this Court on the grounds that:

(1) The constitutional questions presented are of significance to the exercise of freedom of the press and the public's right to know and have not been decided in any opinion by this Court.

(2) A clear conflict exists between the rules of decision for the Ninth Circuit and the Fifth Circuit defining the scope of the newsgathering right of the press.

(3) A clear conflict exists between the rules of decision for the Fifth Circuit and the District of Columbia Circuit limiting the power of government to ban broadcast expression solely because of its asserted offensiveness.

ARGUMENT

I

In refusing to allow Plaintiff newsman to film executions for rebroadcast to the public solely because the State of Texas does not consider the content of such truthful broadcasts fit for public consumption, prison officials are acting as public censors in violation of the First Amendment and pursuing a constitutionally impermissible end

The State of Texas and the U.S. Court of Appeals for the Fifth Circuit misapplied *Pell* and *Saxbe* to this case. In those cases government was not attempting to control the content of expression, to conceal material from the public, or to prevent the public from receiving information that could be gathered only from face-to-face press interviews. The government

in *Pell* and *Saxbe* found it necessary to restrict newsgathering to achieve the compelling state interests of maintaining internal security, prison discipline, and rehabilitative procedures. In this case, the State of Texas seeks to limit newsgathering in order to achieve the unconstitutional end of preventing visual reproductions of state executions from reaching the public. This is censorship by government based solely on content and is not permissible under the First and Fourteenth Amendments. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

It is not so much the absence of any compelling state interest justifying a restriction on newsgathering that is the problem here; it is the pursuit of the patently unconstitutional goal of censorship through restrictions on use of news provided by the closed circuit telecast that is offensive to the Constitution.

The State of Texas has conceded in the District Court the right of reporters to cover death row and executions. It informed both courts it would re-establish the Media Policy which allows "pool" reporters to witness executions directly and others to view the execution via a closed circuit television broadcast provided by Texas. The State of Texas has admitted that no harm to any governmental interest would be produced by the filming of executions. Newsgathering itself is not an issue in this case, and the State of Texas has represented to both the District Court and the United States Court of Appeals for the Fifth Circuit that television apparatus may be set up for closed circuit broadcasts to the press.

The only issue before this Court is whether Texas may refuse access to a reporter who seeks to make an independent recording on film of an execution for later broadcast to the public by television stations through news and/or documentary programs solely to prevent its dissemination to the public. The only reason Texas advances for banning dissemination is the State believes rebroadcasts of executions are not fit for public consumption, they would be offensive and they would shock the public.

Petitioner contends the most fundamental principle of the First Amendment is: The government may not restrict expression solely because of its message or content:

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95; cited in *Hudgens v. NLRB*, 424 U.S. 507, 520.

It is precisely the power to selectively censor expression that the First Amendment was designed to prevent, particularly when that expression involves the conduct of the public's business by public officials:

> But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209.

In *Police Department v. Mosley*, *supra*, the Court struck down an ordinance which prohibited picketing

within 150 feet of school buildings unless the picketing had to do with a labor dispute. The Court found picketing to be expression and the restriction on expression to be based on content and therefore unconstitutional.

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Id.*, 96 See also *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

The Fifth Circuit did not find that the restriction on content could be justified as simply an incidental restriction on speech as the kind identified in *United States v. O'Brien*, 391 U.S. 367 (1968). *O'Brien* is wholly inapplicable where as here, the restriction is aimed at speech itself. See: *Buckley v. Valeo*, 424 U.S. 1, 12-59 (1976). Even if the restriction here could be characterized as "indirect", that in no way affects its constitutionality. See: *Elrod v. Burns*, 427 U.S. 347, 355-73 (1976); *Buckley*, *supra*.

One final point should be made clear. *Pell* and *Saxbe* were clearly not intended to apply to cases in which government manipulated access solely to control the content or dissemination of expression.

> So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe

> that, in drawing such line, [between legitimate state interests and First Amendment rights of prisoners] prison officials must be accorded latitute. *Pell, supra*, 826

And in discussing the media claim in *Pell* at 829:

> In this regard, the media plaintiffs do not claim any impairment of their freedom to publish, for California imposes no restrictions on what may be published about its prison, the prison imates, or the officers who administer the prisons.

In this case the central claim of Petitioner is that Texas intends only to prohibit the publication of films of the executions or the closed circuit telecast. The only goal of Texas is to conceal from the public the "spectacle" of a state execution. *Pell* and *Saxbe* were not cases in which the government's sole purpose was to prevent public dissemination of expression that could be gathered only by the newsgathering method prohibited. This Court made this abundantly clear:

> We recognize that there "may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning," and "that [the] existence of other alternatives [does not] extinguis[h] altogether any constitutional interest on the part of the appellees in this particular form of access." *Kleindienst v. Mandel*, 408 U.S. 753, 765, 33 L.Ed.2d 683, 92 S.Ct. 2576 (1972). But we regard the available "alternative means of [communication as] a relevant factor" in a case such as this where "we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests." *Id.*, at 823-24.

Here there are no legitimate governmental interests

to balance. The Fifth Circuit simply misapplied two admittedly abstruse cases.

II

The Public Possesses a Constitutional Right to Know How State Executions are Conducted.

The Fifth Circuit held the state enjoys the right to exclude the public completely from executions. Petitioner does not contend that this case would require this Court to set out the full limits of the public's right to know, but a fair resolution of this case does involve the recognition of at least a limited public right to know. The court below reasoned that televising an execution amounted to witnessing executions and would thereby frustrate state policy:

> We will not in this case frustrate the official policy of the State of Texas by requiring access to a news cameraman for filming for television executions in state prison, under the guise of protecting First Amendment rights. *Garrett v. Estelle*, 556 F.2d 1274, 1280.

The sole authority cited for this proposition was *Holden v. State of Minnesota*, 137 U.S. 483, 491 (1890). No First Amendment issue was raised in that case either on behalf of the public or the press. Since the First Amendment was not held to be applicable to the States until *Gitlow v. N. Y.*, 268 U.S. 652 (1925), some thirty-five years after *Holden*, it is hardly surprising that no such issue was raised. What is astonishing is the citation of *Holden* as controlling a question that could not have been posed until *Gitlow*. Petitioner respectfully submits that any reliance upon *Holden* is misplaced. The sole issue in that case was whether

the application of a new capital punishment statute to a prisoner convicted under the old death penalty would constitute an ex post facto law. The Court held it would not.

This Court has never definitively ruled as to whether the public's right to know entails a constitutional duty by government to provide some public access to executions. It has however held that judicial proceedings are public events. *Craig v. Harney*, 331 U.S. 367 (1947). Petitioner contends that this Court should hear argument as to whether the state may wholly bar the public from executions, via, the electronic media.

The basic holding of the Fifth Circuit opinion was that the press has no right of access to information not generally available to the public. Therefore, a finding of absolutely no right of public access to executions was essential to the holding of the opinion. The existence of a state statute excluding members of the public from executions in no way settles this constitutional question of first impression.

In a recent line of decisions this Court has extended the public right to receive information necessary to make important decisions, to the area of economic decision-making, by protecting commercial speech from government regulation that would exclude it from the marketplace of ideas. *Bates, et al. v. State of Arizona*, 45 L.W. 4895 [No. 76-316 June 27, 1977] *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

This Court has held on many occassions that the free flow of expression concerning government is essential to democratic decision-making. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *New York Times v. United States*, 403 U.S. 713 (1971). The public possesses a constitutional right of access to information essential to their policitical decision-making when government objects to disclosure only upon the ground that it has judged the material "not fit" for public consumption. Such a right must be inferred from the structure of our Constitution for democratic institutions to retain their responsiveness to the people. See, Black, Structure and Relationship in Constitutional Law. (1969).

III

The Right of Newsmen to Film Executions for Public Dissemination Is Not Co-Extensive with the Right of Members of the Public to Film Executions

That the First Amendment protects the right of the press to gather the news is well-settled, *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Pell v. Procunier, supra;* but the precise scope and nature of that right is unclear, and the question has produced general disagreement among the various jurisdictions. *K.Q.E.D. v. Houchins*, 546 F.2d 284 (9th Cir. 1976) stay granted, *Houchins v. K.Q.E.D.*, 2 Med.L.Rptr. 1273 (Rehnquist, 1977); *U.S. v. Gurney*, No. 75-3338 (Slip Opinion Sept. 12, 1977); *C.B.S. v. Young*, 522 F.2d 234 (6th Cir., *reh. en. banc* 1975); *In Re Adoption of Proposed Local Rule 17*, 339 So.2d 181 (Fla. Sup.Ct. 1976); *Morgan v. State*, 337 So.2d 951 (Fla. Sup.Ct. 1976); *New Jersey v. Allen*, 373 A.2d 377 (N.J. 1977); Loveland, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 Tex.L.Rev. 1440 (1974-75); Comment: *The Right of the Press to Gather Information after Branzburg and Pell*, 124 Univ. of Penn. L.Rev. 166 (1975); Comment, *The Right of the Public and the Press to Gather Information*, 87 Harv.L.Rev. 1505 (1974).

The fundamental point which requires clarification is the language in *Pell, supra* and *Saxbe, supra* which states the press possesses no right to gather information unavailable to members of the public generally. This language suggests three fundamental questions: (1) Must the public's right to know be implemented in the same fashion as the right of the press to gather the news? (2) What is the relationship between the public's right to know and that of the press? (3) Does the rule of *Pell* and *Saxbe* apply to situations in which government allows no access to the public? The scope of these questions and their effect on rights so fundamental to democratic processes urgently demand the immediate attention of this Court.

The first question suggests its own answer. The right to know does not entail any particular method for implementing that right. Certainly, people do not implement their right to know normally by attempting to gather information on their own. Normally, they rely upon the press.

Justice Powell, in his opinions in *Pell, Saxbe* and *Branzburg*, advanced the theory that a central function of the press is to represent the public's right to know in just those situations in which general

public access to the business of government is not possible (or not enough). The text of the Constitution singles out the press as the only private institution explicitly protected and secures for the press special rights. See Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech*, 26 Hastings Law Journal 639 (1973). This Court and others have also recognized the special institutional nature of the press. It is the institution which penetrates and gathers news for the public, edits that news, publishes that news, and disseminates it.

This right of the press to gather the news has been recognized and protected. *Branzburg v. Hayes, supra; Pell, supra; Saxbe, supra; K.Q.E.D. v. Houchins supra; C.B.S. v. Young, supra; Baker v. F. & F. Investment*, 470 F.2d 778, (2d Cir. 1972); *In Re Adoption of Proposed Local Rule 17, supra; Morgan v. State, supra; New Jersey v. Allen, supra*. Government is barred from intruding into the editorial processes of the media since such intrusion could generate media self-censorship. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). Media defendants in libel suits are granted special protection when public issues are involved and special protection from punitive damages to encourage robust media scrutiny of public officials. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Welch*, 418 U.S. 323 (1974). Media representatives may refuse to disclose information in civil trials and in some criminal proceedings which

ordinary members of the public would have to disclose, *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Bursey v. U.S.*, 466 F.2d 1059 (9th Cir. 1972); *U.S. v. Orsini*, 2 Med. L.Rptr. 1446 (E.D.N.Y. 1976); *Morgan v. State*, 337 So.2d 951 (Fla.Sup.Ct. 1976); *Connecticut Labor Relations Board v. Fagin*, 2 Med.L.Rptr. 1765 (Conn. Sup.Ct. 1976). Media defendants in pretrial discovery may invoke the First Amendment to bar disclosure of material that non-media parties might have to disclose. *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. den.*, 411 U.S. 966 (1972); *Cary v. Hume*, 492 F.2d 631 (D.C. 1974); *Cervantes v. Times, Inc.*, 464 F.2d 986 (2d Cir. 1972); *Loadholtz v. Fields*, 389 F.Supp. 1299 (M.D. Fla. 1975); *Democratic National Comm. v. McCord*, 356 F.Supp. 1394 (D.D.C. 1973). Media parties in pretrial discovery must be freed from protective orders constituting prior restraints that would be entered against non-media parties. *Reliance Insurance v. Barron's*, 2 Med.L.Rptr. 164 (S.D.N.Y. 1977). Prior restraints against media must overcome an almost insurmountable burden. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1975); *Near v. Minnesota*, 283 U.S. 697 (1931). And the press has been protected in its role as special auditor of judicial proceedings. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Assuming that the Free Press Clause and the judicial gloss upon it recognizes the press as a constitutionally protected institution, responsible primarily to the people alone, what relationship does this institution enjoy with respect to the public's right to know? A primary function of the press is to

represent the right to know of members of the public at governmental events when the public cannot, or may not, attend.

The relationship of the press to the public's right to know has been clear as a practical matter to government for many years. When the President of the United States or any other executive officer informs the people of his activities he holds a "press conference." When governmental agencies need to reach the public at large they issue "press releases." The reason for this method of procedure is obvious. Government must reach the people to be representative, and each day government routinely recognizes the press as the institution representing the right of the people to know, the institution which communicates governmental activity to the people.

In modern society government has grown immensely in size and complexity. People are not sufficiently mobile or free from the need to earn a living to be able to attend all governmental affairs that interest them. Nor could government accomodate them. Bureaucratic complexity, the individual's alienation from the controlling socio-political strata, and plain economics necessitate the use of an institution to penetrate government, collect information about government, edit that information, and disseminate that information to as broad a range of citizenry as possible. That institution is the press.

The press is more than a neutral informational conduit servicing governmental processes. It is also the "watchdog" on government; it is an institutional

check on all levels and branches of government; it is the only constitutionally recognized private institution.

The courts have recognized that one special constitutional role of the press is to represent the people's right to know. *Near v. Minnesota*, 283 U.S. 697, 719-20 (1931), ("administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect emphasize the primary need for a vigilant and courageous press . . ."); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966), ("The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs . . . thus the press was designed to serve as a powerful antidote to any abuses of power by government officials. . . ."); *Nebraska Press Assoc. v. Stuart*, supra ("Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system, is of crucial import to citizens concerned with the administration of government . . . [majority opinion]. That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint

of the press, however slight, in such instances is unthinkable. [concurrence]")

We submit that in this case the role of the electronic media is to film executions for broadcast in a public television documentary so that people may better understand how their government kills those convicted of capital crimes. To allow the state to prohibit the electronic media from filming executions is to ratify a prior restraint upon the press.

It may be objected that recognizing the constitutional role of the press in representing the public's right to know in situations where untrammeled public access is impossible, converts the press into a public utility or regulated industry. This misconceives the status of the press. It is a constitutionally protected institution that is responsible almost exclusively to the people directly. It is not to be controlled by the branches of government or regulated by them. Like the other great First Amendment institutions implicitly protected by the Religion Clauses, there must be a virtual separation of the press from government control.

IV

In allowing news coverage of executions through printed expression while denying visual coverage, the State of Texas has denied the electronic media the equal protection of the laws.

The State of Texas has granted access to executions for print media reproduction of the event

but denied access for visual reproduction. There are only three possible grounds for distinguishing between the electronic media and the print media in granting access:

1. The unique newsgathering techniques of the electronic media compromise compelling state interests. *Pell, supra, Saxbe, supra.*

2. The content of a visual message is more "offensive" than a second-hand description of an execution.

3. The government owns the airwaves and is entitled to regulate their uniquely intrusive mode of dissemination.

As to the first ground, the State of Texas has agreed to allow the installation of television equipment to monitor the executions and concedes no harm is produced by such newsgathering. The second ground, "offensiveness," has been discussed in Section I, although it may be worth noting the words of *Street v. New York*, 394 U.S. 576, 592 (1969):

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

Finally, the State of Texas did not argue that the peculiarly intrusive nature of television justified its separate classification from the print media, nor could it since it argued the electronic media was free to simulate executions in any fashion it pleased and since the power to regulate the content of television has been delegated to the F.C.C. *C.B.S. Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

In addition, the very recent decision of the District of Columbia Circuit, *Pacifica Foundation v. F.C.C.*, 556 F.2d 9 (D.C. Cir. 1977) holds that government regulation of "offensive" expression on radio and television must be subject to the same strict limitations as its regulation of other modes of expression is. Whatever the merits of allowing the F.C.C. to judge the offensiveness of a particular program to be broadcast at a certain time of day under a standard different from "obscenity" as defined by this Court under the Constitution, that case is not before this Court.

It is obvious that no compelling state interest or even rational basis for distinction exists for the legislative classification invoked by Texas.

V.

The holding of the Court of Appeals that the press has no right of access to information not generally available to the public flatly conflicts with the rule of decision reached in the Ninth Circuit.

In *K.Q.E.D. v. Houchins*, 546 F.2d 284 (9th Cir. 1976), stay granted (Feb. 1, 1977 Rehnquist), *cert. granted*, _____, the Ninth Circuit held that this Court's observation in *Pell* and *Saxbe*, that the press has no right of access to prisons or inmates beyond that afforded to the general public, should not be construed to suggest the right of the press to gather news and the right of the public to know must be implemented in an identical fashion. It limited the language in *Pell* and *Saxbe* to their facts:

> "*Pell v. Procunier* does not stand for the proposition that the correlative constitutional rights

> of the public and the news media to visit a prison must be implemented identically. The access needs of the news media and the public differ. Media access, on reasonable notice, may be desirable in the wake of a newsworthy event, while the interest of the public in observing jail conditions may be satisfied by formal, scheduled tours. Moreover, the administrative problems inherent in public and media access differ. A large public tour group creates a greater security threat and requires the use of more jail personnel to supervise the tour, while a single reporter, known to jail officials, should cause minimal, if any, interference with jail routine. Although both groups have an equal constitutonal right of access to jails, because of differing needs and administrative problems, common sense mandates that the implementation of those correlative rights not be identical. *Id.* at 586.

In contrast, the Fifth Circuit now holds in this case that under the rule of *Pell* and *Saxbe* the rights of the press and the public must be implemented identically. Such conflict affecting the exercise of fundamental rights must be resolved, and this case affords such an opportunity.

VI.

The holding of the Court of Appeals that government may broadly restrict the content of expression to be broadcast by the electronic media solely because such expression is deemed "offensive," but absent any showing of constitutionally defined obscenity, clearly conflicts with the standard adopted by the District of Columbia Circuit.

In *Pacifica Foundation v. F.C.C.*, 556 F.2d 9 (D.C. Cir. 1977), the District of Columbia Circuit held unconsti-

tutional an F.C.C. ban on indecent expression that had not been subjected to the tests set out in *Miller v. California*, 413 U.S. 15 (1973) and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). While the majority did not reach the issue of whether the F.C.C. could ever restrict non-obscene speech, it did find that standard First Amendment tests as to overbreadth and vagueness applied to restrictions on the electronic media. The absolute ban on any use of the seven controversial words at issue in *Pacifica, supra*, was held overbroad since the question as to the constitutionality of state restrictions on their use, would be dependent upon the context in which they were used.

In this case the Fifth Circuit has allowed Texas' absolute ban on any televising of executions, including even a re-telecast of the closed circuit telecast provided by the State. This is clearly overbroad. While some uses of an execution on television could possibly constitute "a public spectacle" devoid of serious social importance, it is obvious that a public television documentary on capital punishment cannot be said, sight unseen, to be offensive in any context. Chief Judge Bazelon stated in his concurrence:

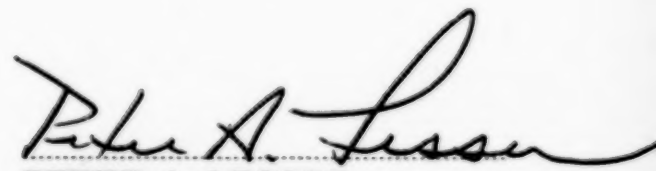
> "Acutely aware of the dangers inhering in any suppression of expression, the Court stated that the realm of permissible regulation must be 'carefully limited'." 413 U.S. at 233-24, 93 S.Ct. 2607. A jury may find a work becomes obscene 'under contemporary community standards' only if the work (1) when taken as a whole (2) appeals to the prurient interest, (3) portrays sexual conduct in a patently offensive way (4) and lacks serious literary, artistic, political or scientific value, 413 U.S. at 24, 93 S.Ct. 2607. The Court further held that obscenity could be regulated only under a specifically defined law, as written or authoritatively construed. The Court said it had limited obscenity regulation to materials that 'depict or describe patently offensive, "hard core" sexual conduct'." *Pacifica*, supra at 21-22.

The majority decision itself stated that the F.C.C. may exercise no powers of "censorship." The Fifth Circuit has allowed the State of Texas to censor the electronic media when the federal agency established by Congress to regulate that industry may not do so. Such conflict requires resolution.

CONCLUSION

For the reasons set out above, Petitioner requests the Petition be granted.

Respectfully submitted,



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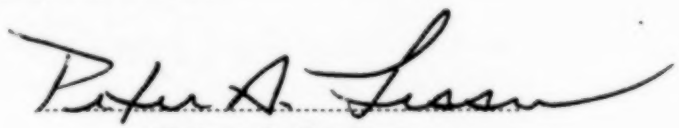
Date: December 1977

CERTIFICATE OF SERVICE

I, Peter A. Lesser, a member of the Bar of the Supreme Court of the United States, do hereby certify that copies of this petition were served on John Hill, Attorney General of Texas, David M. Kendall, First Assistant and Joe E. Dibrell, Assistant Attorney General, Chief Enforcement Division, Attorney for Respondents, on this the 19th day of December, 1977, by placing in a depository of the United States Postal Service, three copies of the petition, with first class postage prepaid, addressed to them at P.O. Box 12548, Capital Station, Austin, Tx. 78711.



Peter A. Lesser

APPENDIX A

Tony GARRETT,

Plaintiff-Appellee,

v.

W. J. ESTELLE, Jr.,
Director, Texas Department of Corrections, et al.,
Defendants-Appellants.

No. 77-1351.

United States Court of Appeals, Fifth Circuit.

Aug. 3, 1977.

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge:

The question for decision is whether a news cameraman can require the State of Texas to permit him to film executions in state state prison for showing on television. Texas denied the right to film executions to Tony Garrett, a TV news cameraman, who then brought this action seeking an injunction to require access for that purpose. The State would allow full access to the event by newsmen, but deny recording of an execution by any mechanical means, such as photography, sound recording or motion picture. The district court ordered Texas to permit Garrett to attend and film executions.

On appeal the State asserts that the first amendment does not impose on it an affirmative duty to make executions available for mechanical recording or photographing. Garrett contends that to prevent

him from filming executions deprives him of rights as a newsman guaranteed under the first and fourteenth amendments. We hold that the protection which the first amendment provides to the news gathering process does not extend to matters not accessible to the public generally, such as filming of executions in Texas state prison, and therefore that Garrett has no such right. Accordingly we reverse the holding of the district court.

The record indicates that Texas has not executed a prisoner since 1964. In November 1976, Garrett, a news reporter for Dallas, Texas television station, requested permission of the Texas Department of Corrections to film the first execution of a prisoner to take place under Texas' new capital punishment statute, and to film interviews with death row inmates. Permission was denied. Shortly thereafter Texas promulgated a "Media Policy: Execution Proceedings" which provided for one representative each from the Associated Press and United Press International to be present at time of execution in the execution chamber as press pool representatives; also facilities at which other press corps members could view a simultaneous closed circuit telecast of the execution; and access to death row inmates for interviews.[1] This policy was soon repudiated,

[1] The full text of the policy statement follows:

Media Policy: Execution Proceedings

One Texas bureau representative designated by the Associated Press and one Texas bureau representative designated by the United Press International will be admitted to the execution chamber as witnesses, provided those designated agree to act as pool reporters for the remainder of the media present and to meet with all media representatives present immediately subsequent to the execution. The remainder of the media shall be allowed to witness the execution via closed circuit television monitors.

—Press interviews of condemned prisoners shall be scheduled by the Public Affairs Office and conducted at the Ellis Unit each Wednesday during the hours of 9:00-11:00 A.M.

—No press interviews of the condemned shall be allowed at the Huntsville Unit.

—Only properly credentialed press will be admitted to witness the execution.

—No recording devices, either audio or video, shall [sic] be permitted either in the execution chamber or monitor room.

—All persons entering the monitor area shall submit to electronic surveillance. Any person detected attempting to introduce recording equipment into the monitoring area shall be excluded automatically.

—No video tapes shall be made from the monitor system.

—TDC shall provide the press the following data:

. . . Historical data concerning the death penalty

. . . Public record information concerning the condemned (Name, D.O.B., Race, County of Conviction, Date Received)

. . . Photograph of condemned

however, because in the opinion of Texas Corrections Commissioner Estelle, Texas Code of Criminal Procedure articles 43.17 and 43.20 effectively prohibited press access to death row inmates and press attendance at executions.[2] Garrett's complaint

[2] Texas Code of Criminal Procedure article 43.17 provides:

Upon the receipt of such condemned person by the Director of the Department of Corrections, he shall be confined therein until the time for his execution arives, and while so confined, all persons outside of said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business, and the relatives, friends and spiritual advisors of the condemned person, who shall be admitted to see and converse with him at all proper times, under such reasonable rules and regulations as may be made by the Board of Directors of the Department of Corrections.

Article 43.20 provides:

The following persons may be present at the execution: the executioner, and such persons as may be necessary to assist him in conducting the execution; the Board of Directors of the

sought judgment declaring article 43.20 unconstitutional, and an injunction prohibiting Texas from preventing him from filming executions and interviews with death row inmates.

On January 5, 1977, the district judge in a preliminary injunction declared article 43.17 unconstitutional in light of the first and fourteenth amendments. The district judge ordered that press visits to death row and the AP—UPI press pool provisions be reinstituted according to the guidelines originally proposed by Texas. The district judge further ordered that Garrett be allowed to witness and film executions. Garrett would then televise all or portions of the film at a later time.

On February 11, 1977, Texas moved to dismiss Garrett's suit and to modify the district court's injunction by deleting the portion ordering the State to allow Garrett to witness and film executions. Accompanying the motions was Texas' statement of intent to adhere to the guidelines which the district judge had ordered reinstituted, and to seek amendment by the State Legislature of article 43.17 to permit interviews with death row inmates. Texas also renewed its proposal that closed circuit television facilities be provided for the press at large. The district judge denied both motions.

Department of Corrections, two physicians, including the prison physician, the spiritual advisor of the condemned, the chaplains of the Department of Corrections, the county judge and sheriff of the county in which the Department of Corrections is situated, and any of the relatives or friends of the condemned persons that he may request, not exceeding five in number, shall be admitted. No convict shall be permitted by the prison authorities to witness the execution.

Texas appeals only that portion of the district judge's preliminary injunction requiring Texas to admit Garrett to the execution chamber to film executions. The State relies on recent Supreme Court decisions holding that the press has no greater right of access to prisons or prisoners than has the general public. It further contends that since the public has no right under the first amendment to film executions, a member of the press has no such right.

Garrett asserts a first amendment right to gather news, which he contends can be limited only on account of a compelling state interest. He further argues that preventing him from using a motion picture camera to gather news denies him use of the tool of his trade and therefore denies him equal protection of the laws. Garrett also contends that the denial amounts to a prior restraint on publication. Amicus curiae further argues that the closed circuit telecast which Texas proposes to provide to the press is a publication, and preventing members of the press from recording the telecast constitutes an illegal restraint on republication.

[1,2] News gathering is protected by the first amendment, for "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed.2d 626 (1972). This protection is not absolute, however. As the late Chief Justice Warren wrote for the Supreme Court, "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 1281, 14 L.Ed.2d 179 (1965). In *Branzburg* the

Court said, "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes, supra*, 408 U.S. at 684, 92 S.Ct. at 2658. Relying on *Branzburg* and *Zemel* the Court has recently held, "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." *Pell v. Procunier*, 417 U.S. 817, 834, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974); *accord, Saxbe v. Washington Post Co.*, 417 U.S. 843, 850, 94 S.Ct. 2811, 2815, 41 L.Ed.2d 514 (1974).

At issue in *Pell* and *Saxbe* were state and federal prison regulations prohibiting prearranged press interviews with individually selected prisoners, though press access to the prison and to prisoners encountered therein was permitted. Members of the press brought an action to protect "their right to gather news without governmental interference, which the media plaintiffs assert includes a right of access to the sources of what is regarded as newsworthy information." *Pell v. Procunier, supra*, 417 U.S. at 829-30, 94 S.Ct. at 2807-08. The press plaintiffs placed great value on prearranged personal interviews; they impressed upon the Court that

> face-to-face interviews with specifically designated inmates is such an effective and superior method of newsgathering that its curtailment amounts to unconstitutional state interference with a free press.

Pell v. Procunier, supra 417 U.S. at 833, 94 S.Ct. at 2809-10.

In each case the Supreme Court noted that the contested regulation was not part of an attempt by government to conceal prison conditions or to frustrate press investigations of those conditions. The Court further noted that the only restriction on news gathering at the prisons was the limited regulation against prearranged personal interviews; that the press was accorded in fact greater access to the prisons and inmates than the public generally. After taking into account the great importance placed on such interviews by the press, the Court held that first amendment protection of news gathering did not invalidate the prison regulations;

> Accordingly, since [the regulation] does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protections that the First and Fourteenth Amendments guarantee.

Pell v. Procunier, supra, 417 U.S. at 835, 94 S.Ct. at 2810; *accord, Saxbe v. Washington Post Co., supra*, 417 U.S. at 850, 94 S.Ct. at 2815.

[3] In the present case Garrett and amicus attempt to distinguish *Saxbe* and *Pell*. Garrett points out that in those cases the press was allowed "substantial access" to the prison and inmates, so that "the only restriction upheld by *Pell* and *Saxbe* was the rule against press singling out specific inmates for interviews." Garrett would have us read those cases for that proposition alone. We cannot agree that those cases must be read so narrowly. The Court made no *ad*

hoc determination in *Saxbe* and *Pell;* it proceeded from the general principle, quoted above, that the press has no greater right of access to information than does the public at large; and that the first amendment does not require government to make available to the press information not available to the public. This principle marks a limit to the first amendment protection of the press' right to gather news. Applying this principle to the present case, we hold that the first amendment does not invalidate nondiscriminatory prison access regulations.

Garrett and amicus argue that the present case is not an access case, but a case involving a limitation on the content of what may be reported once access has been granted. *Saxbe* and *Pell* speak only to access questions, they maintain. This argument cannot be sustained by *Saxbe* and *Pell.* In those cases access was provided except for one purpose, that is, the conducting of prearranged personal interviews. In the present case, similarly, access is provided except for one purpose, to film executions. In order to sustain Garrett's argument we would have to find that the moving picture of the actual execution possessed some quality giving it "content" beyond, for example, that possessed by a simulation of the execution. We discern no such quality from the record or from our inferences therein. Despite the unavailability of film of the actual execution the public can be fully informed; the free flow of ideas and information need not be inhibited.

[4] Amicus refers us to the district judge's memorandum opinion in which *Pell* and *Saxbe* are

distinguished on several additional grounds. The district court said that while *Pell* and *Saxbe* involved reporting merely the day-to-day operation of prisons, the present case involves reporting "one of the most important and controversial public issues of the day" which "should be accompanied in a democratic society by the widest possible public knowledge and information." While we agree that the death penalty is a matter of wide public interest, we disagree that the protections of the first amendment depend upon the notoriety of an issue. The Supreme Court has held that the first amendment does not protect means of gathering news in prisons not available to the public generally, and this holding is not predicated upon the importance or degree of interest in the matter reported.

The district court next distinguished *Pell* and *Saxbe* on the ground that in those cases substantial press access to the prisons was available, while in the present case it is not. That was true when this suit was brought, but in the position in which we review it access has now been provided. As noted, pool reporters may witness an execution in the chamber and other press members may witness it via closed circuit telecast. This is the broadest kind of access, extending, as in *Pell* and *Saxbe,* well beyond that afforded the public generally. As in those cases, there is no effort by prison authorities here to conceal conditions at the prison or inhibit press investigations of those conditions. Thus the asserted ground of distinction is not valid.

Finally, the district judge noted that in *Pell* and

Saxbe prison security and the deterrent value of imprisonment were said to be diminished when certain prisoners, singled out repeatedly for personal interviews, achieved enhanced standing among their peers. No such threats are posed by filming of executions, the district judge reasoned. This ground of distinction is echoed by Garrett and amicus, who argue that before Garrett may be restraned from exercise of his asserted first amendment right to film executions, a "compelling state interest" must be found to balance the infringement of Garrett's right.

Balancing a public interest against an individual's constitutional right has been used when the two are found to be inconsistent. *Pell* and *Saxbe* make clear, however, that the right to gather news, protected by the first amendment, does not impose upon government "the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court." *Pell v. Procunier, supra,* 417 U.S. at 834-35, 94 S.Ct. at 2810. Thus the first amendment does not accompany the press where the public may not go.

[5]We find, then, that according to the principle enunciated by the Supreme Court in *Pell* and *Saxbe,* "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." Therefore, Garrett cannot find his right to film Texas executions in the first amendment.

[6] Garrett next argues that to prevent his filming executions denies him equal protection of the law, since other members of the press are allowed free use of their reporting tools. This argument is also without merit. The Texas media regulation denies Garrett use of his camera, and it also denies the print reporter use of his camera, and the radio reporter use of his tape recorder. Garrett is free to make his report by means of anchor desk or stand-up delivery on the TV screen, or even by simulation. There is no denial of equal protection.

[7] Finally, amicus suggests that the proposed simultaneous closed circuit telecast is a "publication" and that to prohibit its use in any way, such as by filming, is an illegal prior restraint on a republication. This suggestion is similar to the argument made by Garrett that once he is given access to information by the government, here by closed circuit telecast, the government may not limit the use Garrett may make of the information, such as filming it. But the access granted to Garett and the other members of the press is limited. Access for the purpose of filming is not provided, and the first amendment does not require that it be provided.

Televising an execution would amount to conducting a public execution, the State of Texas contends. The Attorney General informed the Court at oral argument that Texas discontinued public executions in 1920. Long prior thereto, in 1890, the Supreme Court upheld the right of a state to restrict attendance at executions. The Court said, "These are regulations which the legislature, in its wisdom, and

for the public good, could legally prescribe . . ." *See Holden v. State of Minnesota*, 137 U.S. 483, 491, 11 S.Ct. 143, 146, 34 L.Ed. 734 (1890) (Harlan J.). We will not in this case frustrate the official policy of the State of Texas by requiring access to a news cameraman for filming for television executions in state prison, under the guise of protecting first amendment rights. It is clear to us that no such constitutional right is guaranteed to a TV cameraman.

We have determined that the Supreme Court rule of *Pell* and *Saxbe* is applicable to the circumstances of the present case, so that the district court erred in finding that the first amendment requires Texas to allow Garrett to film Texas executions. We have also decided that Texas' rule barring the use of motion picture cameras to gather news at executions does not deny Garrett equal protection of the law. Accordingly we reverse the judgment of the district court requiring the State of Texas to permit Garrett to film executions, and we dissolve that portion of the district court's preliminary injunction ordering such permission.

REVERSED.

APPENDIX B

Tony GARRETT

v.

W. J. ESTELLE, Jr., Individually and in his capacity as Chief Director of Texas Department of Corrections, et al.,

Civ. A. No. 3-76-1601-C.

United States District Court, N. D. Texas, Dallas Division.

Jan. 13, 1977.

MEMORANDUM OPINION

WILLIAM M. TAYLOR, Jr., Chief Judge.

Plaintiff Tony Garrett, a television reporter for Public Broadcasting System's station KERA, Channel 13, of Dallas, Texas, is before this Court asserting a First and Fourteenth Amendment right to record on film, for possible later showing on television news, the execution of the first person to be executed since 1964 in the electric chair at the Texas Department of Corrections facility in Huntsville, Texas. At the time of filing his petition herein on December 13, 1976, the execution of a condemned prisoner was scheduled to take place on December 27, 1976. Other executions were scheduled for January 14, 1977, and thereafter.[1] Plaintiff Garrett also seeks access to the inmates now confined by the State of Texas on "death row" in the penitentiary at Hunts-

[1] Prior to the hearing of all of the evidence and arguments of counsel in this case, the December 27, 1976, and January 14, 1977, electrocutions were stayed by the Supreme Court of the United States.

ville, Texas, for the purpose of filming interviews with designated condemned prisoners.

On November 29, 1976, plaintiff had requested permission of the appropriate state official — Mr. Ronald Taylor, Assistant Director of the Texas Department of Corrections — to film the first execution in Texas since 1964 and also permission to film interviews with condemned prisoners then confined on "death row" at the Texas Department of Corrections. Both requests were denied. In refusing these requests the officials at the Texas Department of Corrections pointed to Article 43.17 and Article 43.20 of the Texas Code of Criminal Procedure. Article 43.17 reads as follows:

> Upon the receipt of such condemned person by the Director of the Department of Corrections, he shall be confined therein until the time for his execution arrives, and while so confined, all persons outside of said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary for his health or for the transaction of business, and the relatives, friends and spiritual advisors of the condemned person, who shall be admitted to see and converse with him at all proper times, under such reasonable rules and regulations as may be made by the Board of Directors of the Department of Corrections.

Article 43.20 provides as follows:

> The following persons may be present at the execution: the executioner, and such persons as may be necessary to assist him in conducting the execution; the Board of Directors of the Department of Corrections; two physicians, including the prison physician, the spiritual advisor of the

> condemned, the chaplains of the Department of Corrections, the county judge and sheriff of the county in which the Department of Corrections is situated, and any of the relatives or friends of the condemned person that he may request, not exceeding five in number, shall be admitted. No convict shall be permitted by the prison autorities to witness the execution.

During the years preceding plaintiff's requests, the Texas Department of Corrections had followed an "open-door" policy with the news media and had finally reduced its media policy in regard to prisoners on "death row" to a written policy statement which reads as follows:

Media Policy: Execution Proceedings

One Texas bureau representative designated by the Associated Press and on Texas bureau representative designed by the United Press International will be admitted to the execution chamber as witnesses, provided those designated agree to act as pool reporters for the remainder of the media present and to meet with all media representatives present immediately subsequent to the execution. The remainder of the media shall be allowed to witness the execution via closed circuit television monitors.

> Press interviews of condemned prisoners shall be scheduled at the Ellis Unit each Wednesday during the hours of 9:00 - 11:00 A.M.
>
> No press interviews of the condemned shall be allowed at the Huntsville Unit.
>
> Only properly credentialed press will be admitted to witness the execution.
>
> No recording devices, either audio or video, shall

be permitted either in the execution chamber or monitor room.

All persons entering the monitor area shall submit to electronic surveillance.

Any person detected attempting to introduce recording equipment into the monitor area shall be excluded automatically.

No video tapes shall be made from the monitor system.

TDC shall provide the press the following data:

. . . Historical data concerning the death penalty
. . . Public record information concerning the condemned (Name, D.O.B., Race, County of Conviction, Date Received)
. . . Photograph of condemned.

This media policy had come about as a result of the public interest in capital punishment which had increased in intensity following the decision of the Supreme Court on July 2, 1976, in the case of *Jerry Lane Jurek v. State of Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929. In 1972 the Supreme Court had struck down as unconstitutional the Texas death penalty statute in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, and the statute was amended by the Texas legislature. It was this amended statute that the Supreme Court held to be constitutional on July 2, 1976, in *Jurek v. Texas, supra*. There have been no executions in Texas since 1964, and the first execution to take place since that year was felt by many to be an historical and newsworthy event. It was in the light of this controversy which was raging not only in Texas but throughout the Nation concerning the propriety of

the death penalty that plaintiff sought permission to film interviews with prisoners on "death row" and to film the first execution for possible later showing on television.

Since 1924 when Texas determined that the electric chair should be the instrument of capital punishment, representatives of the print media have had access to executions and to condemned prisoners on "death row." Upon being advised of the above-quoted articles of the Texas Code of Criminal Procedure, however, Mr. W. J. Estelle, Jr., Director of the Texas Department of Corrections, concluded that representatives of the news media both print and electroic, should be excluded not only from executions but also from any access whatsoever to prisoners on "death row."

On the question of denying the news media access to "death row" for the purpose of interviewing condemned prisoners, the defendants rely exclusively on the cases of *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495, and *Saxbe v. Washington Post Company*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514. While the Supreme Court of the United State did in the *Pell* case uphold the California statute which denied press and other media interviews with specific individual inmates and in *Saxbe* upheld the Policy Statement of the Federal Bureau of Prisons prohibiting personal interviews between newsmen and individually designated inmates of federal medium security and maximum security prisons, there is little, if any, similarity between those cases and the one at bar.

In *Pell* and *Saxbe* the object of the news media was to

report the day-to-day operation of the prisons. Here, the news media is seeking to report on one of the most important and controversial public issues of the day; capital punishment. The carrying out of the death penalty is an act of state. It is the ultimate act of state. A state execution is an act of the collective wills of all the people. For 13 years no person in Texas has been subjected to the death penalty and such a significant change in state policy should be accompanied in a democratic society by the widest possible public knowledge and information. The persons who under Article 43.17 and Article 43.20 of the Texas Code of Criminal Procedure are given access to condemned persons and permitted to be present at the execution can in no sense of the word be considered as representatives of the public and because of the size of the execution chamber only a limited number of newsmen can be admitted. The people through these representatives must have access to the dungeons and the "death rows" so that the people remain aware of the workings of their government. If there is any subject about which the people have a "right to know," surely it is this. ". . . the First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government." See dissenting opinion of Justice Powell in *Saxbe, supra* at p. 862, 94 S.Ct. at p. 2821.

A second important difference between this case and the *Pell* and *Saxbe* cases is that there was substantial news media access to the correctional institutions involved in those cases. Here, under the above-quoted statutes, there is no public access whatsoever to "death row" and no public witnessing of an execution. Specifically, in *Pell* and *Saxbe* there were regular press tours of the prisons during which news media representatives could photograph inmates and facilities and interview those prisoners they encountered. Also in *Pell* and *Saxbe*, the news media had access to recently released inmates for information. This circumstance will not exist insofar as inmates on "death row" are concerned. In short, the only access the public or the news media have to "death row" in Texas is that which can be gained indirectly from attorneys and family members who have visited inmates and through letters received from inmates, many of whom are at best marginally literate.

The third major difference between this case and the *Pell* and *Saxbe* cases is that there were in those cases some justifications for restrictions on interviews, none of which are present here. In those cases there was evidence that interview restrictions were necessary for prison security. Here, TDC officials state that their news media policies permitting interviews never compromised prison security in any way. Further, in those cases there was evidence that the interviews had created disciplinary problems. In this case the extent of disciplinary problems was that some inmates had "heaped verbal abuse" upon a fellow inmate who had given an interview. Also in *Pell* and *Saxbe* there was evidence that the presence of news media representatives adversely affected rehabilitation. In this case, of course, "death row" inmates are not there for rehabilitation. In fact, under

the Texas statute a specific jury finding is required to the effect that it is probable that the defendant would commit criminal acts of violence constituting a continuing threat to society before the death penalty can be assessed. Finally, TDC officials testified that the policy of permitting interviews from 9:00 to 11:00 A.M. on Wednesdays had not even caused any appreciable administrative inconvenience.

Fourth, in *Pell* and *Saxbe*, the Court was concerned that the granting of press interviews might diminish the deterrent value of imprisonment. While this may be a proper consideration with respect to normal prison inmates, it can scarcely be applicable to condemned inmates awaiting the most extreme punishment that society can administer.

[1] The foregoing considerations and the admonition in *Branzburg v. Hayes*, 408 U.S. 665 at 681, 92 S.Ct. 2646, 2656, 33 L.Ed.2d 626, that "without some protection for seeking out the news, freedom of the press could be eviscerated" compels the holding that the absolute ban on news media access to the prisoners on "death row" and to the execution chamber by Article 43.17 and Article 43.20, Texas Code of Criminal Procedure infringes on the First Amendment freedom of press.

[2,3] That there can be no complete ban on access to "death row" or to executions, of course, does not mean that there can be no regulatio of public or media access to "death row" and the inmates therein. On the contrary, prison officials have broad authority to regulate and limit access where there are security, disciplinary, rehabilitation, administrative, or other

reasons for so doing. All this Court is ordering is that the Texas Department of Corrections restore the limited access it previously allowed and, in addition, to permit one television reporter with camera to witness any execution.

To go further and articulate the obvious, the state may clearly regulate access to prisons in terms of numbers of visitors to be admitted, times they are permitted to remain, advance notice required to be given, and in many other respects. In fact, there are any number of reasonable regulations that could properly be imposed in the interest of prison security, discipline, and good order. All that we are saying here is that, particularly where the First Amendment freedom of the press is involved, the state cannot be permitted, where there is no reason or justification for so doing, to draw an impenetrable veil of security around a public institution being operated by public officials, with public moneys, for the welfare of the public. To permit such a ban on access to a public institution, where there is no need or justification for it, would be to permit arbitrary, capricious and unreasonable restraints to be placed upon the right of the people to know what their own government is doing. It is inconceivable that this could be permitted in a democratic society.

With our technological advances, the electronic media, both television and radio, have become an integral part of the national communication system by which our people obtain the information upon which to form their judgments about national policies. One final point to be considered, therefore, is

whether any of the distinctions which have been made in the past between print and electronic news media are applicable in the coverage of an execution. We are unable to find that they are.

The most important distinction between print and electronic access to public events involves coverage of trials. As the Supreme Court of the United States pointed out in *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, however, cameras are excluded from trials because they tend to disrupt the proceedings. Specifically, the court in the *Estes* case said that the presence of cameras in a courtroom tends to distract jurors, influence witnesses so as to distort their testimony, harass and prejudice the defendant, and make it more difficult for the judge to guarantee a fair trial. Similarly, cameras are often excluded from other *deliberative* proceedings.

An execution, however, is an entirely mechanical process carried out only after all deliberative proceedings have been completed. It is not seriously contended that a single television reporter, carrying a compact, quiet, portable film camera requiring no special lighting, can in any way disrupt or interfere with this state proceeding.

Of course, the real concern is not over the presence of a television reporter with camera at an execution or even the filming of the execution, but rather the possible later broadcast of such film on television news programs. It is argued that such broadcasts would be an "offense to human dignity," "distasteful," or "shocking." This may well be true, but the question here is whether such decisions are to be made by

government officials or by television news directors. The state says, in effect, that "We, the government, have determined that the governmental activity in this instance is not fit to be seen by the people on television news." In addition to being ironic, such a position is dangerous.[2] If government officials can prevent the public from witnessing films of governmental proceedings solely because the government subjectively decides that it is not fit for public viewing, then news cameras might be barred from other public facilities where public officials are involved in illegal, immoral, or other improper activities that might be "offensive," "shocking," "distasteful" or otherwise disturbing to viewers of television news.

[4,5] The government cannot be allowed to bar cameras from governmental proceedings without more compelling and factually demonstrable reasons than such vague and highly subjective concepts as "taste" and "dignity." Unless there is some substantial factual basis for denying access to public proceedings, it is for the news media itself to determine what governmental activities are sufficiently tasteful, dignified, or acceptable to be reported. As the Supreme Court has observed, "That editors—newspaper and broadcast—can and do abuse . . . [the power to select and choose news material] is beyond doubt, but that is no reason to deny this discretion . . .. Calculated risks of abuse are taken in

[2] It might be suggested here that if what the government is doing is so terrible, perhaps the government should not be doing it. At the very least, the people should have the widest possible information about such "shocking" governmental proceedings.

order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedom of expression." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 124-125, 93 S.Ct. 2080, 36 L.Ed.2d 772.

In addition, the people themselves are the final masters of what news they consume; they have the most effective tool with which to shield themselves from reports they consider unacceptable—selective reading and selective television viewing. With such effective self defense mechanisms, it is difficult to understand why any government official in an open, republican society would presume to arrogate to himself the function of news censor, even if there were no First Amendment. As James Madison stated, "If we advert to the nature of republican government, we shall find that the censorial power is in the people over the government, and not in the government over the people." 4 Annals of Congress 934 (1794).

For the foregoing, reasons, this Court, on January 5, 1977, issued a preliminary injunction declaring Article 43.17 of the Texas Code of Criminal Procedure violative of the First Amendment as an absolute and unjustified ban on access of the news media to "death row" inmates; ordering the re-institution of the TDC media policy permitting interviews with "death row" inmates between the hours of 9:00—11:00 A.M. on

Wednesdays; ordering the re-institution of the TDC policy to permit two pool representatives of the print media to witness any execution; and ordering the admission of plaintiff Tony Garrett to any execution for purposes of filming such execution, provided that plaintiff agrees to act as pool representative for the electronic media and to provide, at cost, copies of film so taken to other representatives of the news media. An amended Injunction, incorporating minor technical modifications, was entered on January 11, 1977.

APPENDIX C

United States Court of Appeals
For the Fifth Circuit
No. 77-1351
D. C. Docket No. Ca-3-76-1601

Tony GARRETT,
Plaintiff-Appellee,

versus

W. J. ESTELLE, Jr., Director,
Texas Department of Corrections, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, reversed.

August 3, 1977

Issued as Mandate: Sept. 29, 1977

APPENDIX D

United States Court of Appeals
Fifth Circuit
Office of the Clerk
September 21, 1977

TO ALL PARTIES LISTED BELOW:

No. 77-1351 — Tony GARRETT v. W. J. ESTELLE, Jr.

Dear Counsel;

This is to advise that an order has this day been entered denying the petition ( ) for rehearing,** and no member of the panel nor Judge in regular active service on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) and petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk
By Brenda M. Hauck
Deputy Clerk

**on behalf of appellee, Tony Garrett,

CC: Mr. John L. Hill
Messrs. Joe Dibrell, Jr.
David Kendall
Mr. James D. Whisenand
Mr. Fred Time
Mr. Tom S. McCorkle
Mr. Peter Lesser